

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62523-3-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
TONY SMITH,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 24, 2010

Spearman, J.-A jury found Tony Smith guilty of three counts of burglary in the second degree. At trial, an officer who had viewed surveillance videos of the burglaries and a photo of Smith testified that he believed the burglaries were all committed by the same person. On appeal, Smith asserts that the trial court abused its discretion in admitting the officer's testimony. We conclude that the trial court did abuse its discretion in admitting the officer's testimony because the detective had no other contacts with Smith, and was in no better position to identify Smith than the jury. But because the evidence was overwhelming as to two of the three convictions, we reverse and remand only one conviction. We affirm in part, reverse in part, and remand.

FACTS

On September 3, 2006, Seattle Savings Bank reported that someone had broken into their offices and stolen several laptops. The bank had surveillance

No. 62523-3-I/2

video of the burglary showing a non-employee entering the building. An employee from the Northwest Education Loan Association, which is located in the same building, testified that a laptop, projector, and digital camera were stolen from her office on September 3, 2006.

On December 28, 2007, police received a call from Seattle Savings Bank reporting another burglary. Several laptops had been taken. There were surveillance camera images of this burglary as well.

On January 7, 2008, employees at the Freeman Company discovered that nine laptops were missing from their building. The back door of the building had been pried open. The building has four motion-activated surveillance cameras. The footage from the surveillance cameras on the night of January 7 showed an African-American man forcibly entering the building.

That same day, two police officers on patrol pulled into the parking lot of the Seattle Motor Inn. A man approached the patrol car and told the officers that he did not have any warrants and was going to pick up a television set that he had left behind in a room at the hotel. When the officers went into the room to investigate, Tony Smith opened the door. Smith was wearing a shirt with the Freeman Company logo on it. Inside, the police found a variety of electronic equipment, including laptops and camera equipment.

The police gave Smith a citation for trespassing and took him to the precinct to verify his identity. An officer told Smith they had his picture at the burglary. Smith responded, "Was that

going in or coming out?” Smith also asked, “Are you happy now that you’ve got me?” A manager of the Freeman Company testified that the shirt Smith was wearing was one of those specifically made for Freeman Company employees, which were not available for sale.

On January 18, 2008, at 7 p.m., the police received a dispatch call about a burglary in the Department of Social and Health Services building at 2106 Second Avenue. An officer arrived at the scene a few minutes later and saw a man on the first floor of the building going from cubicle to cubicle. The man in the building tried to open a door without success. He picked up a trashcan and smashed the window in the door, and then hit the door handle so hard that it fell off.

A janitor working in the building that evening saw Smith on the second floor. The janitor testified that Smith seemed surprised to see him, and then looked like he was going to cry. The janitor let the officers into the building and indicated that Smith was upstairs. Officers entered the building and found Smith on the second floor, sitting on a chair. The officers arrested Smith and found two screwdrivers in his coat pocket. After the officers arrested Smith, he twice said that he was sorry. The damage to the building included broken glass and the broken door. In addition, electronic office equipment had been moved from various locations into the hallway.

The State charged Smith with four counts of burglary in the second degree. Count I was the January 7,

2008 burglary of the Freeman Company. Count II was the January 18, 2008 burglary of the DSHS building. Count III was the September 3, 2006 burglary of the Seattle Savings Bank. Count IV was the December 28, 2007 burglary of the Seattle Savings Bank.

Smith filed a motion to exclude opinion testimony by the police officers, with the specific concern that an officer would testify that “Smith is the person in the video surveillance and that is a question for the jury to decide.” The court denied the motion to exclude, stating that the officer could offer a lay opinion that the person in all the surveillance videos appeared to be the same individual, and the jury would ultimately determine whether that opinion testimony was well founded.

At trial, several police officers and other witnesses testified. Detective Phillip Wall, who had had no previous contact with the defendant, testified at length about the surveillance tapes from the two Seattle Savings Bank burglaries and the Freeman Company burglary. Detective Wall stated that, after comparing the three videos, he “believed them all to be [of] the same suspect.” Detective Wall also compared a recent photo of Smith to the Freeman Company video and the Seattle Savings Bank video and testified, “It was my opinion that the suspect they had in custody and had booked in the jail strongly resembled the prior video evidence that I’d seen from all three burglaries.” Detective Wall’s opinion was based on his conclusion that the suspect in all three videos had similar physical characteristics: a shaved head, a

protruding jaw line, a round face, and a similarly shaped head. Detective Wall also testified that, while watching the Seattle Savings Bank video, he had noticed that “the suspect appeared to have a necklace with a round object dangling from the necklace” on the outside of his shirt. When Detective Wall looked through the evidence that had been recovered from Smith after the DSHS burglary, he found a silver ring on a chain.

Detective Wall also offered a number of other opinions suggesting that the suspects depicted in the surveillance videos were the same individual. For example, he testified that in each of the charged burglaries the suspect was African-American while the population of Seattle is 80 percent white; thus, one would expect the suspects in a proportionate number of the instant burglaries to be white. He opined that the charged burglaries were likely to have been committed by the same person because it is unusual for a burglar to take such large amounts of property as occurred in the instant cases. In addition, in none of the cases did the suspect use a motor vehicle. He also noted “that burglars like to go back to the same location” because they are familiar with it and know where the surveillance cameras are located.

Smith’s testimony was limited to the January 18, 2008 burglary of the DSHS building. Smith said that he was really drunk and on medication that evening, and that he urinated on himself. Smith testified that he stopped at the DSHS building because he knew there was a shower inside, so he went in and took a shower. Smith said that when

he couldn't get out of the building, he started crying and "blanked out." Smith testified that he had tools in his backpack for work.

The jury found Smith guilty as charged of three counts of burglary in the second degree, counts I, II, and IV. The jury was unable to reach a verdict on count III. Smith's counsel agreed that Smith's offender score was nine plus. With an offender score of nine plus, the court sentenced Smith to a standard range Drug Offender Sentencing Alternative. He received concurrent sentences of 29.75 months on each charge to be served in confinement, and 29.75 months on each charge to be served on community custody.

Smith appeals.

DISCUSSION

Opinion Testimony

Smith asserts that, because Detective Wall was in no better position to identify Smith than the jury, the trial court abused its discretion in admitting Detective Wall's testimony that the three surveillance videos depicted the same individual, who strongly resembled Smith.

The court admitted Detective Wall's testimony as an opinion from a lay witness in order to explain the officers' actions, and as evidence to help the jury determine a fact at issue, i.e., the identity of the person who committed the burglaries. Under the Washington Rules of Evidence, lay opinion testimony is limited to "those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to

a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702." ER 701. "Opinion testimony identifying individuals in a surveillance photo runs 'the risk of invading the province of the jury and unfairly prejudicing [the defendant.]'" State v. George, 150 Wn. App. 110, 118, 206 P.3d 697 (2009) (quoting United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). A lay witness may give opinion testimony regarding the identity of a person in a surveillance photograph if there is some basis to conclude that the witness is more likely to be able to identify the defendant from the photograph than the jury. George, 150 Wn. App. at 118; State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994), affirmed sub nom. State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

This case is analogous to George, in which the jury watched a surveillance video of the robbery Lionel George and Brian Wahsise were charged with committing. An officer who was present when George and Wahsise were arrested testified that "he had viewed the surveillance video 'hundreds of times' before trial and identified George as the person standing at the Days Inn counter and Wahsise as one of the two men stealing the television." George, 150 Wn. App. at 115-16. The officer based his opinion on the defendants' builds, the way they carried themselves, what they were wearing, and by talking to them later. George, 150 Wn. App. at 115-16. George objected to the identification, but the

court, relying on Hardy, 76 Wn. App. 188, found that the jury could decide whether the officer's testimony was credible and what weight to give it. George, 150 Wn. App. at 116.

On appeal, the court found that the trial court's reliance on Hardy was misplaced. In Hardy, the court considered two cases consolidated on appeal. In both cases an officer was permitted to testify about the identity of the defendant in a videotape recording of a drug transaction. Hardy, 76 Wn. App. at 189. In each case, the officer testified that he had known the defendant for several years. Hardy, 76 Wn. App. at 191-92. Consequently, the court found that the officers were more likely to be able to identify the defendants than the respective juries. Hardy, 76 Wn. App. at 192. By contrast, in George the officer's familiarity with the defendants was limited to viewing the surveillance videos "hundreds of times," George, 150 Wn. App. at 115. The court concluded that "[t]hese contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality video." George, 150 Wn. App. at 119. The court found that the error as to George was harmless, but reversed and remanded Wahsise's conviction. George, 150 Wn. App. at 119-20.

Likewise, here, the State claims that because Detective Wall was able to review the surveillance videos numerous times, frame by frame, his opinion regarding the similarities of the persons

depicted in the videos would be helpful to the jury and thus, admissible pursuant to ER 701. However, Detective Wall's familiarity with the defendant arose almost solely from his review of the surveillance videos. On these facts, as in George, there is little if any basis for concluding that the detective was more likely to correctly identify the defendant from the videos than the jury.

At oral argument the State sought to distinguish this case from George. The State argued that here the defense prevented the jury from having the same opportunity to view the videos as many times or as meticulously as Detective Wall. Thus, Detective Wall's familiarity with the videos constituted specialized knowledge, making his opinion regarding the suspects' similarities helpful to the jury. This argument is not well taken.

First, even assuming that the detective's familiarity with the videos constituted "specialized knowledge," the testimony would not have been admissible pursuant to ER 701 because under that rule lay opinions are by definition opinions that are not based on specialized knowledge. See ER 701(c). Second, the record reveals no rulings by the court limiting the manner in which the State could present the video evidence to the jury.¹ At trial, the State chose to have a security technician and a facilities manager lay the foundation for the videos and describe what was occurring in the videos. The

¹ The only preliminary motion the defense made concerning the videos was a motion to exclude the videos and photographs unless the State could lay a proper foundation and authenticate them, which the court granted.

State chose not to play the videos while Detective Wall was testifying, but instead had him testify after the jury had already seen the videos. It was the State's decision to rely on Detective Wall's testimony and present the evidence the way it did. The State made no request to allow the jury to see the video in slow motion or frame by frame, and offered only one still photograph from the videos, which was admitted over the defendant's objection. There is nothing in the record to support the State's assertion that either the defendant's objections or the court's rulings prevented the State from presenting the video evidence in the manner it deemed most effective.

We conclude that, because Detective Wall had no previous familiarity with Smith, he was in no better position to identify Smith from the surveillance videos than the jury.²

The State also argues that Detective Wall's opinions were admissible as expert testimony. In support of this argument, the State cites the "specialized knowledge" that Detective Wall gained from his multiple viewings of the surveillance videos and his years of experience as a police officer and detective. However, this argument fails. The State has offered no authority for the proposition that merely viewing a video multiple times, frame by frame, qualifies

² In its Statement of Additional Authority, the State cites United States v. Zepeda-Lopez, 478 F.3d 1213 (10th Cir. 2007), for the proposition that a lay opinion regarding the identity of a suspect depicted in a video is admissible where the witness has had no previous contact with the suspect but has viewed the video multiple times. However, Zepeda-Lopez is factually distinguishable. Zepeda-Lopez's identity was not in dispute. In his opening statement Zepeda-Lopez's attorney admitted that the person depicted on the videotape was the defendant. Zepeda-Lopez, 478 F.3d at 1217.

as “specialized knowledge” as required by ER 702. Moreover, the State did not lay a foundation which qualified Detective Wall as an expert in identifying unusual or remarkable characteristics of either burglars or burglaries. There is no evidence in the record of Detective Wall’s credentials as a purported expert beyond the testimony that he had been a police officer for 20 years, and that two of those years had been spent as a detective in the burglary and theft unit.

We conclude that the trial court abused its discretion in admitting Detective Wall’s testimony at trial.

Harmless Error

The State asserts that even if Detective Wall’s testimony was improperly admitted, the error was harmless. “When evidence is improperly admitted, the trial court’s error is harmless if it is minor in reference to the overall, overwhelming evidence as a whole.” George, 150 Wn. App. at 119.

We conclude that the error is harmless as to count I, the burglary of the Freeman Company on January 7, 2008. At trial, the jury heard testimony by Freeman Company employees that laptops had been stolen from their building. The jury also saw footage from the surveillance cameras on the night of January 7 showing an African-American man forcibly entering the building. The officers who arrested Smith testified that they found him in a hotel room with a lot of electronic equipment, including laptops and camera equipment, and wearing a shirt with the Freeman Company logo on it. A manager of the Freeman Company testified that the shirt Smith

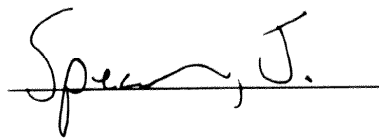
was wearing was specifically made for Freeman Company employees and was not available for sale. When an officer told Smith they had a picture of him at the burglary, Smith replied, "Was that going in or coming out?" Smith also asked the officers, "Are you happy now that you've got me?" We conclude that Detective Wall's testimony was minor in relation to this overwhelming evidence that Smith committed the burglary of the Freeman Company.

We also conclude that the error is harmless as to count II, the burglary of the DSHS building on January 18, 2008. At trial, the janitor who was working in the building on the night of the burglary testified that he saw Smith on the second floor. The officers who arrested Smith testified that they entered the building and found Smith upstairs, on the second floor, sitting on a chair. The officers also testified that they found two screwdrivers in Smith's coat pockets. And after the officers arrested Smith, he twice said that he was sorry. The damage to the building included broken glass and the broken door, and monitors had been moved from desks into the hallway. In light of this overwhelming evidence, Detective Wall's testimony identifying Smith was minor.

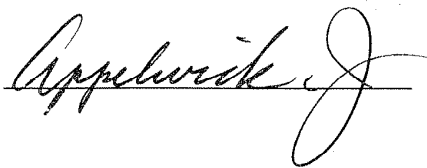
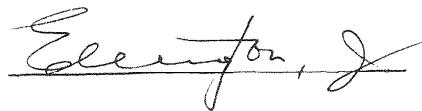
But we conclude that the error is not harmless with regard to count IV, the December 28, 2007 burglary of the Seattle Savings Bank. In its reply brief, the State relies almost entirely on Exhibits 63 and 66, the surveillance videos from the burglary, to support its claim of harmless error for the 2007 burglary of Seattle Savings Bank. These surveillance videos do not provide overwhelming evidence that Smith committed the

December 28 burglary. The videos are blurry and do not have a clear shot of the suspect's face. The videos show the suspect opening doors and leaving with equipment, but for the most part, the suspect is looking down at the floor or away from the camera. The videos from the lobby of the building are of better quality, but only show the profile of the suspect from a distance, or walking toward the camera but looking down. Again, there are no clear images of the suspect's face in the videos. It does appear that the suspect is wearing a backpack similar to the one in the surveillance video from the Freeman Company. After viewing these videos, the jury could have found that Smith committed the December 28 burglary, but the evidence as a whole is not overwhelming relative to Detective Wall's testimony.

We conclude that the error was not harmless, and reverse and remand for a new trial on count IV.³

A handwritten signature in cursive script, appearing to read "Steven J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Appelwick, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Elenor, J.", written over a horizontal line.

³ Smith also asserts that he received ineffective assistance of counsel because his attorney agreed to his offender score at sentencing instead of challenging the inclusion of two California felonies. We need not address the issues Smith raises challenging his offender score because Smith will have an opportunity to raise challenges to his offender score on remand.